Akliansyah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–289–11 OF 2012
BALIA YUSOF, ABDUL AZIZ ABD RAHIM AND TENGKU MAIMUN JJCA
4 FEBRUARY 2014

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in paper bag carried by appellant — Whether trial judge had considered totality of evidence and viewed it from all angles — Whether trial judge erred in drawing inference less favourable to appellant — Whether trial judge failed to appreciate defence adequately — Whether conviction was unsafe

While a team of police officers were carrying out a surveillance of a motor car ('the car') parked at a basement car park, they saw the appellant open the front door side of the car with a remote control car key. The appellant was observed opening the front door and bending over before making his way to the boot of the car to take out a paper bag from the boot. While the appellant was leaving the car with the paper bag in his hand he was arrested by a police officer. The arresting officer ('AO') found the bag to contain two plastic bags, which were later confirmed by a chemist to be 1,965g of methamphetamine. The appellant was charged with the offence of trafficking, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant's defence was that he went to the place of incident to meet one Cheok Kok Wah (CKW) to seek for employment as an assistant mechanic in CKW's workshop. The appellant explained that after discussing about his employment and before he left, CKW had requested him to fetch a bag from his car that was parked at the basement parking area and deliver it to him at the autopay machine where he would be waiting. The appellant further claimed that while he was carrying out this errand, he was arrested by the police. The trial judge doubted the appellant's defence of applying for a job as a mechanic with CKW when he had no work permit or experience as a mechanic. The trial judge also found it illogical that the appellant would have met CKW outside the office to discuss his employment. Based on her evaluation of the evidence, the trial judge found the appellant guilty of the offence of trafficking and sentenced him to death. This was the appellant's appeal against that conviction and sentence on the grounds that the trial judge had failed to consider the evidence objectively and from all angles before finding him guilty of the offence. The appellant submitted that it was a crucial point in his defence that when he was arrested, he had informed his AO that he was an innocent carrier with no knowledge about the drugs in the car boot, but that the trial judge had dismissed these issues as irrelevant. It was also

A the appellant's contention that the trial judge had failed to appreciate his defence adequately.

Held, allowing the appeal:

B (1) The AO's testimony as to what the appellant had said when he was arrested went to establish through evidence from the prosecution that the appellant had picked up the bag containing the drugs from CKW's car at the latter's request. This defence indicated principally that the appellant had no knowledge about the drugs. Throughout the prosecution's case C the appellant had put forward this defence but the trial judge had erred by stating that this was a mere suggestion from the defence and not evidence. If the trial judge had considered the totality of the evidence and viewed it from all angles she would have realised that the evidence proffered by the prosecution fell short of proving knowledge on the part D of the appellant. The inference drawn by the trial judge that the appellant knew about the paper bag in the boot without considering other material and relevant facts and evidence and without viewing the totality of the prosecution's case from all angles was an error that would merit appellate intervention. There was a misdirection and it should stand corrected (see E paras 15–18).

(2) It is trite that when two or more than one inference could be made from a set of facts against an accused person, the court should draw the one most favourable to him. On the facts of the present case, the evidence of the conduct of the appellant could be viewed in two ways. As such, the F favourable inference, namely that the appellant had no knowledge about the contents of the bag ought to have been drawn (see para 19).

(3) The appellant's evidence that he had applied for a job with CKW in his workshop had been corroborated. Further, CKW was not a fictitious G person but someone, who had been detained for drug related activities. A judge hearing the defence need not be unduly concerned about the truth of the defence but should consider whether the defence story was probable and had raised a reasonable doubt on the prosecution case. In the present case, the trial judge had not sufficiently considered and H appreciated the appellant's defence that the real trafficker was CKW. As such, the conviction of the appellant was unsafe (see paras 27, 29 & 34).

[Bahasa Malaysia summary

I Semasa sepasukan pegawai polis menjalankan pengawasan terhadap sebuah kereta yang diletakkan di tingkat bawah tanah tempat letak kereta, mereka melihat perayu membuka pintu hadapan kereta dengan kunci kereta kawalan jauh. Perayu dilihat membuka pintu hadapan dan tunduk sebelum berjalan ke arah but kereta untuk mengambil keluar beg kertas daripada but. Semasa perayu berjalan meninggalkan kereta dengan beg kertas di tangannya dia

ditangkap oleh pegawai polis. Pegawai penangkapan tersebut ('AO') mendapati beg tersebut mengandungi dua beg plastik, yang kemudiannya disahkan oleh ahli kimia dadah methamphetamine seberat 1,965g. Perayu dituduh dengan kesalahan mengedar, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pembelaan perayu adalah bahawa dia pergi ke tempat kejadian untuk berjumpa dengan seorang yang bernama Cheok Kok Wah ('CKW') untuk memohon pekerjaan sebagai pembantu mekanik di bengkel CKW. Perayu menjelaskan bahawa selepas membincangkan mengenai pekerjaannya, dan sebelum dia meninggalkan tempat tersebut, CKW meminta dia mengambil beg daripada keretanya yang diletakkan di tingkat bawah tanah kawasan letak kereta dan menghantar kepadanya dekat mesin bayaran automatik di mana dia akan menunggu. Perayu selanjutnya mendakwa bahawa semasa dia menjalankan kerja ini, dia ditangkap oleh polis. Hakim perbicaraan meragui pembelaan perayu memohon untuk berkerja sebagai mekanik dengan CKW apabila dia tidak mempunyai permit kerja atau pengalaman sebagai mekanik. Hakim perbicaraan juga mendapati adalah tidak logik bahawa perayu menemui CKW di luar pejabat untuk berbincang mengenai pekerjaannya. Berdasarkan penilaiannya terhadap keterangan, hakim perbicaraan mendapati perayu bersalah terhadap kesalahan mengedar dan menjatuhkan hukuman mati ke atasnya. Ini adalah rayuan perayu terhadap sabitan dan hukuman atas alasan bahawa hakim perbicaraan telah gagal untuk mempertimbangkan keterangan secara objektif dan daripada semua sudut sebelum mendapati dia bersalah terhadap kesalahan tersebut. Perayu berhujah bahawa ia adalah poin yang penting dalam pembelaannya bahawa apabila dia ditangkap, dia telah memberitahu AO yang dia adalah pembawa tak bersalah tanpa pengetahuan mengenai dadah di dalam but kereta tersebut, tetapi hakim perbicaraan telah menolak isu-isu ini sebagai tidak relevan. Adalah juga hujahan perayu bahawa hakim perbicaraan telah gagal untuk menilai pembelaannya secara wajar.

Diputuskan, membenarkan rayuan:

(1) Keterangan AO terhadap kenyataan perayu apabila dia ditangkap telah dibuktikan melalui keterangan daripada pihak pendakwaan bahawa perayu mengambil beg yang mengandungi dadah daripada kereta CKW atas permintaan CKW. Pembelaan ini menunjukkan terutamanya perayu tidak mempunyai pengetahuan mengenai dadah tersebut. Sepanjang kes pihak pendakwaan perayu telah mengemukakan pembelaan ini tetapi hakim perbicaraan telah tersilap dengan menyatakan bahawa ini adalah cadangan semata-mata daripada pembelaan dan bukan keterangan. Jika hakim perbicaraan mempertimbangkan keseluruhan keterangan dan melihatnya daripada semua sudut beliau akan sedar bahawa keterangan yang dikemukakan oleh pihak pendakwaan tidak mempunyai pembuktian pengetahuan oleh pihak perayu. Inferens yang dibuat oleh hakim perbicaraan bahawa perayu mengetahui mengenai beg kertas di

dalam but tanpa mempertimbangkan material lain dan fakta dan keterangan relevan dan tanpa melihat kepada keseluruhan kes pihak pendakwaan dari kesemua sudut adalah kesilapan yang akan mewajarkan campur tangan mahkamah rayuan. Terdapat salah arah dan ia patut diperbetulkan (lihat perenggan 15–18).

(2) Adalah undang-undang nyata bahawa apabila dua atau lebih daripada satu inferens boleh dibuat daripada set fakta terhadap tertuduh, mahkamah patut membangkitkan satu yang lebih memihak kepadanya. Atas fakta kes ini, keterangan terhadap tingkah laku perayu boleh dilihat dalam dua cara. Dengan itu, inferens yang memihak, iaitu bahawa perayu tidak mempunyai pengetahuan mengenai kandungan beg patut dibuat (lihat perenggan 19).

(3) Keterangan perayu bahawa dia memohon untuk kerja dengan CKW di bengkelnya telah disokong. Selanjutnya, CKW bukan seseorang yang direka tetapi seorang, yang telah ditahan untuk aktiviti berkaitan dadah. Hakim yang mendengar pembelaan tidak perlu prihatin mengenai kebenaran pembelaan tetapi patut mempertimbangkan sama ada cerita pembelaan adalah munasabah dan membangkitkan keraguan yang munasabah ke atas kes pendakwaan. Dalam kes ini, hakim perbicaraan tidak mempertimbangkan dan menilai pembelaan perayu bahawa pengedar sebenar adalah CKW. Dengan itu, sabitan perayu tidak selamat (lihat perenggan 27, 29 & 34).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Aedy Osman v PP [2011] 1 CLJ 278, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337; [1998] 2 CLJ 469, FC (refd)
DPP v Brooks [1974] 2 All ER 840, PC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Looi Kow Chai & Anor v PP [2003] 1 CLJ 734, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Iskandar Mohamad Yusof [2006] 5 MLJ 559; [2006] 6 CLJ 379, HC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Tai Chai Keh v PP [1948–1949] MLJ Supp 105b (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795; [1998] 1 CLJ 37, CA (refd)
Yen Wen Chin v PP & Another Appeal [2008] 6 CLJ 773 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6, 7

Appeal from: Criminal Trial No 45A-134 of 2001 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nadia Hanim bt Ahmad Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA (delivering judgment of the court):

[1] The appellant filed an appeal against his conviction and sentence on a charge of trafficking in 1965g of methamphetamine, an offence under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

[2] We allowed his appeal and we now give our reasons.

[3] Briefly, the fact of the case goes as follows:

> On 22.8.2010 at about 4.15 pm, PW2 together with a team of officers had carried out surveillance on a Volvo car parked at the basement parking at the IKEA in Damansara. Soon, the appellant was seen walking towards the car and opened the front driver's side of the car door with a remote control key. The appellant was seen opening the door and bending over. He was then seen opening the boot of the car and took out a paper bag. After closing the boot, he was seen leaving the car and immediately PW2 pounded on him. The appellant was still clutching the paper bag. PW2 found the paper bag to contain a shoe box containing two transparent plastic packets suspected to be containing drugs. The appellant was arrested and the exhibits were handed over to the Investigating Officer (PW4). PW5, the Government Chemist certified that the suspected drugs seized from the appellant to be 1965 grams of methamphetamine.

[4] Before us, learned counsel for the appellant, in the person of Encik Hisyam Teh Poh Teik submitted that the learned trial judge had committed an error in failing to consider the prosecution's case in its entirety to find a prima facie case against the appellant. That being the main issue in this appeal.

[5] In finding that the appellant had possession of the impugned drugs, the

learned trial judge had found that he was caught red handed. The paper bag was not hidden and that his actions of opening the car door, bending over and subsequently opening the boot taking out the paper bag without any hesitation gave rise to an inference that he knew about the drugs in the bag. The trial judge also found 'his actions were smooth and without any hesitation'. Invoking the s 37(da) presumption, the learned trial judge called upon the appellant to enter his defence.

[6] Encik Hisyam submitted that in so finding, the learned trial judge had failed to consider the following factors, namely:

(a) the Volvo car did not belong to the appellant. The owner of the car, one Gan Yau Wen was arrested in the same vicinity on the same day of the incident as he was fleeing from the place;

(b) a person by the name of Cheok Kok Wah (CKW) and a female were also arrested in the same vicinity at the time of the incident;

(c) CKW was detained in Simpang Renggam under the Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('LLPK') for drug related activities as disclosed from the evidence of SP2 and SP4 and so was Gan Yau Wen who was detained at Sungai Petani;

(d) there is a nexus between CKW, the Volvo car and the paper bag containing the drugs;

(e) The appellant upon his arrest did not even struggle or made any attempt to flee or to even drop the bag; and

(f) The non-calling of the owner of the car had left a gap in the prosecution's case. The evidence of the car owner who was known and was also arrested at the same time of the incident could at least have explained about the paper bag in the boot and whether the appellant had anything to do or any connection with the same. It could also have explained the lingering doubt as to whether CKW had any connection with the paper bag containing the drugs found in the boot of the Volvo car.

[7] The learned trial judge had dismissed all these issues as irrelevant. We disagree with the learned trial judge. These issues about the owner of the car and the person by the name of CKW were raised by the appellant during the prosecution's case itself, namely, about the arrest of these two persons at the same vicinity on the same day of the incident.

[8] It was the appellant's defence that on the day in question, he had met up with this person by the name of CKW at Starbucks, Bangunan IKEA as he wanted to get a job in CKW's workshop. After having discussed about his employment with CKW and when he was about to leave, CKW requested the

appellant to go to the Volvo which was parked at the basement car park to fetch a bag which was in the boot of the Volvo and then hand the bag to CKW. CKW then handed the key and the remote control key to the appellant and told the appellant that he would be waiting at the autopay machine at the parking level P2. The appellant obliged.

[9] The appellant then went to the Volvo, opened the door on the driver's side and bent inside to look for the boot lever. He could not find it and closed the door. He then went to the boot, unlocked and opened it. He saw a paper bag inside the boot. At this point of time, the appellant said two men approached him and identified themselves as 'Polis'. One of them asked him what he wanted to take and the appellant replied that he wanted to take the bag. The appellant was arrested and was handcuffed. The bag was examined and there were two plastic packets containing substances in a shoe box found in the bag. He was shocked. The appellant had told the police that the bag belonged to CKW and it was CKW who asked him to fetch the bag. He also told the police about CKW and where he was waiting for the appellant. Based on the information given by the appellant, CKW was arrested.

[10] Throughout the prosecution's case, this defence of the appellant was put forward. Principally it was put to the prosecution to indicate that the appellant had no knowledge about the drugs. When SP2 was giving evidence during cross-examination, he agreed with the defence suggestion that the appellant had told him it was CKW who had requested him to collect the paper bag from the boot of the car. The learned trial judge however, in her decision stated that it was a mere suggestion from the defence and not evidence.

[11] We agree with learned counsel that the learned trial judge had erred in so holding. When SP2 agreed to the question posed to him during cross-examination, the answer given to the same is evidence. In other words it was established through evidence from the prosecution itself that the appellant was told to pick the bag from the boot of the car by the said CKW.

[12] We had perused the records and we found that the learned trial judge had failed to consider the various aspects of the case as put forth in the preceding paragraphs of this judgment of ours. We are of the considered view that these are material facts established in evidence which ought to have been considered by the learned trial judge. The learned trial judge had failed, in our view to consider the evidence adduced by the prosecution from all angles. It was incumbent on her part to do so.

[13] We made reference to *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 where the Supreme Court observed the following at p 142:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy*: ' … the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[14] This court had an occasion to deal with a similar issue in Mohamed b Abdul Rahman (Court of Appeal Criminal Appeal No: T-05–336–12 of 2011) wherein I had stated:

> Taking into consideration the totality of the evidence, we are of the considered view that the learned trial judge had failed to consider that the room where the drugs were found was accessible to others and there was no exclusive custody and control of the drawer by the appellant. Our perusal of the learned trial judge's grounds of judgment did not indicate that His Lordship had made that consideration. In our view, that evidence is material and failure to consider material evidence does make an error of law is beyond argument. (*Gotham Construction Co v Amulya Krishna* (1967) AIR Calcutta 91).

[15] We agreed with the submissions of Encik Hisyam that had the learned trial judge considered the totality of the evidence and viewed it from all angles, the evidence proffered by the prosecution fall short of proving knowledge on the part of the appellant. We agree that there was no overt act of the appellant other than 'terkejut' and 'tergamam' as stated by SP2. But that did not seem to have been considered by the learned trial judge to be against the appellant.

[16] The inference of knowledge was drawn by the learned trial judge in the following manner at pp 108–109 of the *Rekod Rayuan Jilid* 2:

> Di dalam kes ini, Tertuduh telah ditangkap dengan beg kertas (P14a) yang mengandungi barang kes yang tidak berada dalam keadaan tersorok (hidden). Keadaan ini memberi inferen bahawa Tertuduh tahu berkenaan dadah yang dibawa di dalam beg tersebut. Tindakan tertuduh yang dilihat oleh SP2 terus menuju ke kereta tersebut, membuka pintu kereta dengan remote control, membongkokkan badan ke dalam kereta tersebut, menutup pintu kereta, membuka boot, mengambil P14(a) dan seterusnya menutup kembali tanpa apa-apa keraguan ('hesitation') memberi irresistible inference yang tertuduh mengetahui beg P14 itu berada di dalam boot tersebut. 'His action were smooth without any hesitation.'

[17] It was not necessary for the learned trial judge to infer that the appellant

knew about the paper bag P14 was in the boot because there is already evidence before her that CKW had told the appellant to pick up a bag from the boot of the car.

[18] We concluded on this issue by expressing our view that this inference drawn by the learned trial judge without considering other material and relevant facts and evidence and without viewing the totality of the prosecution's case from all angles is an error which merits appellate intervention. There was a misdirection and it must stand to correction.

[19] We agree that the evidence about the conduct of the appellant may be viewed either way. (*Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1, *DPP v Brooks* [1974] 2 All ER 840). There is always the other side of the coin. Proof of knowledge is very often a matter of inference which varies from case to case (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1998] 1 CLJ 37, *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585). SP2 as we have stated earlier, had given evidence to say the appellant 'terus terkejut dan tergamam' (p 14 *Rekod Rayuan Jilid* 1) when SP2 introduced himself as a police officer and held the appellant. This we have said did not matter to the trial judge as nothing was made out of this from her grounds of judgment and on her inference of knowledge. The learned trial judge however was more swayed about the coolness of the appellant in 'his actions were smooth without hesitation'. Both these conducts of the appellant may be viewed either way and may lead to different inferences being made. It is trite that when two or more than one inference can be made from a set of facts against an accused person, the court should draw the one most favourable to him. (*Tai Chai Keh v Public Prosecutor* [1948–1949] MLJ Supp 105b, *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 1 CLJ 734, *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC)). On the set of facts and circumstances before the court, the favourable inference that the appellant had no knowledge about the content of the bag ought to have been drawn. Call him whatever, an obedient servant, an errant boy or a messenger boy of CKW, the appellant picked the bag from the car boot at the behest of the said CKW. His conduct being smooth and without hesitation as the learned trial judge had found, was more consistent with innocence.

[20] We now consider the appellant's other ground of appeal, on the failure of the learned trial judge to appreciate the defence. Beside himself giving evidence on oath, the appellant had also called two other witnesses to support his defence, an officer from the Suruhanjaya Syarikat Malaysia ('SSM') and an officer from the Simpang Renggam dentention centre.

[21] The gist of the appellant's defence was that he went to the place of incident to meet CKW to seek for an employment as an assistant mechanic. Before that, he had stopped to buy some clothings for his children. After discussing about his employment and before he left, CKW requested him to fetch a bag in a Volvo car at the basement parking area and to hand it over to him at his waiting place near the autopay machine at P2. Upon reaching the parking area and finding the car, the appellant opened the door at the driver's side to look for the lever to open the boot but was unable to find it. He then closed the door and opened the boot with the key which was given to him by CKW earlier. Upon opening the boot, he saw a paper bag but before he could fetch it, the police came and arrested him. He told the police that the bag belonged to CKW and he was asked to fetch it. He also told the police where CKW was waiting.

[22] SD2, Cik Aimi Mas'ad bt Yusuf, an officer from the SSM tendered exh D22 which was a company returns from a company named Malaysian Vehicle Body Works Sdn Bhd. The evidence of SD2 corroborated the appellant's evidence about his application for job with CKW in the latter's workshop known as Malaysian Vehicle Body Works Sdn Bhd and that CKW's sister was the boss in the workshop.

[23] SD3 was a Penguasa Penjara, Pusat Pemulihan Akhlak, Simpang Renggam and he tendered exhs D23 and D24 which were detention order and suspension order under ss 6 and 7 of the LLPK. The allegations of fact against CKW in the detention order (exh D23) states:

> 1. Bahawa kamu didapati terlibat dengan aktiviti pengedaran dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine di antara pertengahan bulan Mei 2010 hingga 22.08.2010 di sekitar IKEA dan The Curve, Mutiara Damansara, Petaling Jaya, Selangor.
> 2. Bahawa kamu didapati mengedar dan menjual dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dalam bentuk 100g, 250g dan 3,000g.

[24] Learned counsel submitted that these allegations of fact relates to the date and time where the appellant was arrested at the IKEA basement car park on 22 August 2010. The type and amount of drugs being methamphetamine and 3,000g in weight fit neatly with the evidence of the prosecution's case. Exhibit P10, a police report lodged by SP2 states that the amount of drug seized was 3,000g and not 30,000g as reported earlier.

[25] Upon her consideration of the defence, the learned trial judge had found:

> … Jika diteliti, didapati sememangnya cerita Tertuduh adalah tidak munasabah, tidak boleh diterima akal dan tidak lojik …

and gave reasons that it was illogical for the appellant to buy clothes and send them to Indonesia considering that he had been in and out of Malaysia from Indonesia for 41 times within a period of more than four years. The appellant had no work permit and that being a contract worker and having no experience as a mechanic how could the appellant have applied for a job as an assistant mechanic from CKW. The trial judge also found it illogical for CKW to come to IKEA to meet the appellant instead of the appellant going to see him at his office in Salak Selatan.

[26] Learned counsel for the appellant submitted that the learned trial judge had failed to consider what the core of the appellant's defence was, that is, it was CKW who requested the appellant to go to the car and pick the bag to be handed over to him and that CKW was the real trafficker. The trial judge had failed to appreciate that CKW was not a fictitious person. He was detained under the LLPK for activities relating to drugs. The allegations of fact against him fit very neatly with the time and type of drugs for which the appellant was being charged. The conduct of the appellant being smooth and without hesitation was consistent with his innocence. The appellant was not at all familiar with the car. He had to search for the lever at the driver's seat to open the boot and could not find any. We know that it is normal for many types or make of cars to have the lever to open the boot located at the side of the driver's seat. It could very well be true that CKW was the real trafficker. The story of the appellant was at the very least, probable.

[27] A judge hearing the defence, need not be unduly concerned about the truth of the defence but must consider whether the defence story is probable and has raised a reasonable doubt on the prosecution's case. The time tested case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 has always been the guiding principle which magistrates and judges had been following.

[28] There are evidence that spoke in favour of the appellant in his defence and those evidence, had it been properly appraised and appreciated by the learned trial judge, are consistent with the defence of the appellant. The failure of the trial judge to do so is a misdirection.

[29] It was further submitted by the appellant's learned counsel that the prosecution in the instant case had failed to rebut the defence case that it was CKW who was the real trafficker. The appellant was an innocent carrier who had no knowledge about the drugs in the car boot. He was only told to pick up a bag from the car boot. Notice of such was given to SP2 as early as when the

A appellant was arrested and evidence was led during the cross-examination of SP2 on the arrest of this person. SP2 had admitted so.

[30] The Federal Court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 219; [1996] 1 CLJ 705 p 709 had among others stated:

B

> … the onus was on the prosecution to check whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts.

C

(see also: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705.)

[31] A similar sentiment was again expressed by the Federal Court speaking through James Foong FCJ in *Aedy Osman v Public Prosecutor* [2011] 1 CLJ 278 at p 283:

D

> … it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

E

[32] In *Aedy Osman*, the Federal Court also stated that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the accused, citing *Public Prosecutor v Iskandar Mohamad Yusof* [2006] 5 MLJ 559; [2006] 6 CLJ 379, *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; [1998] 2 CLJ 469 and *Yen Wen Chin v Public Prosecutor & Another Appeal* [2008] 6 CLJ 773.

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[33] We are of the view that the learned trial judge had not sufficiently considered and appreciated the defence. We do not think a maximum evaluation of the defence evidence had been undertaken by the learned trial judge in the circumstances of the case. The defence evidence must be considered to reevaluate the prosecution's case at the conclusion of the case. This, we found had not been done. We agree with Encik Hisyam's submission that the learned trial judge had not appreciated the appellant's core defence that the real trafficker was this other person in the name of CKW.

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[34] On the grounds submitted before us, we find the conviction of the

appellant to be unsafe. This appeal is allowed and the conviction and sentence set aside. The appellant will walk a free man. He is hereby acquitted and discharged.

Appeal allowed.

Reported by Kohila Nesan